

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

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77-6033

United States Court of Appeals
FOR THE SECOND CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

—v.—

AMERICAN EXPRESS COMPANY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

PROSKAUER ROSE GOETZ & MENDELSON
Attorneys for Defendant-Appellant
300 Park Avenue
New York, New York 10022
(212) 593-9000

Of Counsel:

MORTON M. MANEKER
FRANKLIN S. BONEM
WARREN J. CASEY

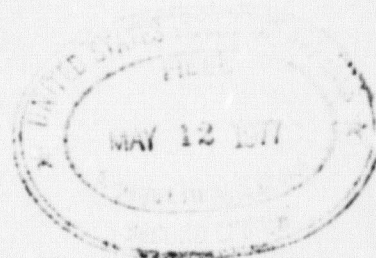


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6033

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

-v-

AMERICAN EXPRESS COMPANY,

Defendant-Appellant.

On Appeal From the United States District Court
For the Southern District of New York

APPELLANT'S REPLY BRIEF

THE EEOC'S EXCUSE FOR ITS INORDINATE
DELAY IN BRINGING SUIT IS GROUNDLESS

In its answering brief, the EEOC makes the completely groundless and irresponsible assertion that:

The Record Affirmatively Shows that
the Commission's Delay in Filing Suit
Was Attributable to the Defendant."

(Point II, at 27)

The Commission seeks to avoid the consequences of its own negligence and to justify its misuse of the Title VII enforcement processes by casting responsibility for its delay upon an employer who did nothing more than accept its belated invitation to discuss settlement, and who actually executed two settlement agreements negotiated with, and approved by, the Commission's trial attorneys, but subsequently rejected by the office of the EEOC General Counsel. American Express did not lull the EEOC into security as to the consequences of its failure to intervene in the pending private action and of its extraordinary delay in filing suit. To the contrary, the Commission's attorneys were repeatedly and expressly informed by the employer's counsel that their failure to intervene and their continued delay precluded suit on the Ferrell charge and that only current practices which could be the subject of fresh charges were subject to suit. (Supp. App. 5 and 9)*

It is not true, as stated in the Commission's brief at 20, that the Company "request[ed] further conciliation when it was informed that the Commission

* References following "Supp. App." are to Appellant's Supplemental Appendix.

contemplated suit on the Ferrell charge." It was the Commission, not the employer, which, in January, 1974, invited the Company "to discuss the possibility of a voluntary resolution." (EEOC Supp. App. 1)*

More important, throughout the following two years before suit was finally brought, the Commission was in complete and unchallenged control of both the substance and the timing of the negotiations, and the manner in which they were conducted.

Despite the Company's repeated protests, it was the Commission which decided to negotiate through attorneys who had no authority to bind the Commission, to reject the agreements reached by them and to continue to refuse to negotiate through officials with full authority. (Supp. App. 3 and 8) It was the Commission, not the Company, which took seven months to consider the two agreements proposed its own negotiators and executed by the Company, and

* The delays prior to the commencement of negotiations in January, 1974 were also solely the Commission's responsibility (see Appellant's Brief at 11). The Commission does not even claim any excuse for this delay of almost three years from the filing of the charge in June, 1971, and almost two years from March, 1972, when the Commission obtained the general authority to sue under the 1972 Title VII amendments.

and then to reject them. (Supp. App. 7 and 8) It was the Commission which proposed to continue negotiations after each rejection and it was the Commission which decided to stop negotiating in the midst of the third round and to bring suit. (Supp. App. 7 and 8) See generally Supp. App. 3-10 for the detailed chronology of the negotiations between the Commission and the Company.

It is thus clearly untrue that the Commission would have filed suit or moved to intervene in the Ferrell action before it was settled "had it not been for the Commission's acceptance of defendant's representations that it wished to settle all matters," as the Commission now claims. (Appellee's Brief at 28-29)

The Company's supposed representations, for which no record reference is given by the Commission, were completely true, as evidenced by its execution of the settlement agreements reached with the Commission's trial attorneys. (Supp. App. 33 and 55) The Commission's inertia was not the result of any misplaced reliance on anything said or done by the employer. It, more likely, reflected an awareness, at least at that time, that the Ferrell charge could no longer be the subject of a Commission suit and that if a settlement was not consummated, any suit by the EEOC would have to be based on new charges.

It is equally untrue that the Company deviously "kept on negotiating until after the Ferrell suit was settled" in order to prevent a Commission suit on the Ferrell charge or its intervention in the private suit until it was too late, as the EEOC now claims. (Appellee's Brief at 28) The Company signed the first EEOC settlement in January, 1975, months before the Ferrell settlement. (Supp. App. 19-37)* The settlement between the Company and the EEOC was awaiting execution by the EEOC when the Ferrell settlement was signed in March, 1975 and the private action dismissed in May, 1975. (App. 39a) The EEOC could, at any time prior thereto, have rejected the settlement and sought intervention. It did nothing before the Ferrell settlement was consummated. Thereafter, it rejected its own settlement in June, 1975 (Supp. App. 38), but proposed new negotiations to resolve its objections (Supp. App. 40).

Quite aside from the rule that settlement negotiations do not excuse a party's laches in bringing

* The settlement included resolution of the Reese charge as well as the Ferrell charge. The implication on page 29 of the EEOC's brief that the Company was responsible for delay by offering to negotiate with respect to the Reese charge, is completely unfounded. The Company merely suggested that the negotiations as to Ferrell and Reese be kept in the same EEOC bureau because the pending proposals included settlement of both charges. (EEOC Supp. App. 9-10) This was obviously intended to hasten, rather than to delay, the disposition of the entire controversy.

suit, Mackall v. Casilear, 137 U.S. 556 (1890),* the record is clear that nothing the Company said or did misled the Commission or in any way contributed to its neglect and inertia. The Commission delayed so long in processing the Ferrell charge that Ferrell obtained, in accordance with the Congressional design, the right to bring an independent private action to resolve his claim. He did so in September, 1973, more than two years after he filed his charge. The Commission, in January, 1974, decided belatedly to make a further settlement effort and, if that failed, to bring its own action despite the Congressional prohibition against duplication of proceedings. (EEOC Supp. App. 1) It apparently was unwilling to seek intervention in the Ferrell action and a stay of that action pending any further settlement efforts it wished to make, although a stay for that purpose is expressly authorized by the statute, §706(f)(1) of Title VII.

* See also United States v. 422,978 Square Feet of Land, 445 F.2d 1180, 1188 (9th Cir. 1971); Howard University v. Cassell, 126 F.2d 6, 12 (D.C. Cir.), cert. denied, 316 U.S. 675 (1941); Fattore v. United States, 312 F.2d 797, 800 (Ct. Cl. 1963); Melhorn v. Amrep Corp., 373 F. Supp. 1378, 1381 (M.D. Pa. 1974); Yatzor v. Allen, 365 F. Supp. 875, 878 (W.D. Pa. 1973), aff'd, 503 F.2d 1400 (3d Cir.), cert. denied, 420 U.S. 929 (1975); Sam Finley, Inc. v. Pilcher, Livingston & Wallace, Inc., 314 F. Supp. 654, 655 (S.D. Ga. 1970).

Having thereafter decided to terminate its negotiations with the Company, the Commission brought a second suit on the Ferrell charge thus attempting, contrary to the Congressional design, to undermine the Company's private settlement and the ability of employees like Ferrell to prosecute and settle their own charges and escape the consequences of administrative delay. It also thus sought, contrary to the statutory scheme, to impose the burden of multiple litigation on the same charge upon the Company which, if the Commission had acted with any promptitude, it would have been able to avoid by consolidation of the two suits.

Finally, the Commission has attempted to shift to others the responsibility for this misuse of the statutory procedures by divulging its settlement negotiations with the Company in violation of the express prohibitions of Title VII.

Section 706(b) of Title VII provides that "nothing said or done" during and as a part of EEOC "informal methods of conference, conciliation, and persuasion" may be divulged by the EEOC or any of its representatives."* The statute

* "... If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the

provides that "any person who makes public information in violation of this subsection" is guilty of a crime, §706(b).

As shown in Appellant's Brief at 39-40, Congress' goal in enacting Title VII was to encourage voluntary settlement of disputes involving alleged employment discrimination. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Weise v. Syracuse University, 522 F.2d 397, 412 (2d Cir. 1975). If employers who negotiate with the EEOC are subject to the risk that the Commission will, as it has here, attempt to use the negotiations against them in litigation, the statutory scheme of enforcement will be seriously impaired. Employers will be reluctant to engage in conciliation efforts with the Commission if it is allowed to flout the specific statutory guarantee of confidentiality as it has done here.

The Company moved in the District Court to strike the EEOC's papers which improperly revealed the settlement negotiations and which have now been submitted to this Court in

(Cont'd from page 7)

Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both...." 42 U.S.C. §2000e-5(b).
(Emphasis added.)

the EEOC Supplemental Appendix. (Supp. App. 1) See Parker v. EEOC, 534 F.2d 977, 978 (D.C. Cir. 1976); EEOC v. Raymond Metal Products Co., 530 F.2d 590, 597 (4th Cir. 1976); Dunlop v. Board of Governors, 11 EPD ¶10,745 (N.D. Ill. 1975); Mosely v. General Motors Corp., 20 F.R. Serv. 2d 701, 704 (E.D. Mo. 1975). The District Court has not ruled on the motion. This Court should, in accordance with the statutory prohibition against divulging conciliation efforts, strike the offending disclosures.

CONCLUSION

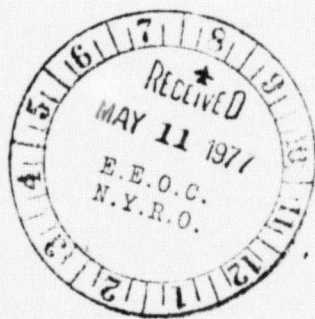
The order appealed from should be reversed, with instructions to dismiss the complaint to the extent it is based on the Ferrell charge of discrimination.

Respectfully submitted,

PROSKAUER ROSE GOETZ & MENDELSON
Attorneys for Defendant-Appellant

Of Counsel:

Morton M. Maneker
Franklin S. Bonem
Warren J. Casey



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Harold G. Lipson